

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000142-MR

BRIAN T. O'DONOGHUE, M.D.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE W. DOUGLAS KEMPER, JUDGE
ACTION NO. 04-CI-002937

KENTUCKY BOARD OF MEDICAL
LICENSURE

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: LAMBERT AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Dr. Brian T. O'Donoghue appeals the dismissal of his declaratory judgment action seeking to find KRS 311.592(2) unconstitutional. The Jefferson Circuit Court dismissed the action as moot when Dr. O'Donoghue entered an agreed order in a

¹Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Kentucky Board of Medical Licensure administrative action. After careful review, we affirm.

On September 26, 2002, the Kentucky Board of Medical Licensure (hereinafter “the Board”) received a grievance from the daughter of a patient of Dr. O'Donoghue. The grievant complained that Dr. O'Donoghue had given her mother excessive amounts of controlled substances and continued to provide those controlled substances following her mother's suicide attempt and her request for the doctor to discontinue the medications. As part of its investigation, the Board's investigator interviewed two local physicians. Each expressed concern about Dr. O'Donoghue's liberal prescribing of controlled substances. One doctor expressed concern over Dr. O'Donoghue's prescribing narcotics to patients who had been refused by other doctors, and the other provided the names of seventeen patients whose prescribing histories should be reviewed. The Board also obtained a record of Dr. O'Donoghue's history of prescribing controlled substances. Dr. O'Donoghue was interviewed about the grievance and was provided the opportunity to submit a written response for review by the inquiry panel.

After careful review, the Board consultant concluded that Dr. O'Donoghue's medical treatment and care of the grievant's mother met the standard of care in Kentucky, but the consultant further determined, after reviewing the records for twenty patients, that Dr. O'Donoghue had violated specific sections of KRS 311.595 and/or 311.597. The consultant concluded that Dr. O'Donoghue had deviated from the standard of care and

had actually committed a pattern of acts which would be deemed gross incompetence or ignorance in his prescribing of controlled substances to the patients reviewed. The consultant further determined that Dr. O'Donoghue's practice constituted a danger to the health, welfare, and safety of patients and the public.

The inquiry panel reviewed all of the information available at its February 19, 2004 meeting. The panel voted to ask Dr. O'Donoghue to voluntarily enter into an agreed order of indefinite restriction, under which he would agree to stop prescribing controlled substances until approved to do so by the panel following some re-education and a specific time period. In the alternative, the panel voted to issue a complaint and an emergency order of restriction. Dr. O'Donoghue declined to enter into the agreed order, and the panel subsequently issued a complaint and emergency order of restriction, prohibiting Dr. O'Donoghue from professionally utilizing controlled substances pending the final resolution of the complaint.

On March 16, 2004, Dr. O'Donoghue filed his request for an emergency hearing, which was scheduled for March 29, 2004. Dr. O'Donoghue served as his only witness, providing testimony about his medical training and the nature of his solo practice. He explained how his personal pain experience of Hodgkin's lymphoma as a teenager had led to his philosophy on pain medications. He did not contest any of the consultant's findings regarding the number of pain medications prescribed nor the quantities. He asserted that he felt the Board's guidelines were simply suggestions.

In her final order, the hearing officer detailed the various findings of fact supporting the inquiry panel's emergency order of restriction. She then reasoned,

[p]ursuant to the requirements of KRS 311.592(2)[see Conclusions of Law, below], the Hearing Officer accepts these findings of fact of the Inquiry Panel as establishing, by a rebuttable presumption, substantial evidence that Dr. O'Donoghue has failed to meet the minimum standards of care in prescribing or dispensing controlled substances to patients, and that such failure constitutes immediate danger to the health, safety, or welfare of patients or the general public.

The hearing officer affirmed the Emergency Order of Restriction.

Dr. O'Donoghue then sought judicial review of this final order in Jefferson Circuit Court. As part of that review, Dr. O'Donoghue moved the court to enjoin the Board from enforcing its emergency order of restriction. Over the Board's objection, the court issued a temporary injunction pending completion of the judicial review.

On April 13, 2006, Dr. O'Donoghue and the Board finally resolved the complaint by entering into an agreed order. On July 20, 2006, the Board filed a motion to dismiss the petition for review on the grounds that the emergency order of restriction had become moot and no longer had legal effect following the entry of the agreed order resolving the complaint. The court agreed in an opinion and order and dismissed the petition for judicial review. Dr. O'Donoghue filed a motion to alter, vacate, or amend, which was denied. This appeal followed.

Dr. O'Donoghue argues that it was improper for the court to dismiss his motion for declaratory judgment seeking to have KRS 311.592(2) declared unconstitutional. We disagree.

The law is clear that courts will not decide abstract or academic questions and will dismiss a case when it becomes moot. *Board of Education of Berea v. Muncy*, 239 S.W.2d 471 (Ky. 1951); *Brown v. Baumer*, 191 S.W.2d 235 (Ky. 1945); *Reeves v. Talbott*, 159 S.W.2d 51 (Ky. 1941). This is particularly true where the parties have resolved the underlying controversy by settlement. *Stairs v. Riley*, 208 S.W.2d 961 (Ky. 1948).

In the case at hand, the parties entered into an agreed order which informally resolved the underlying controversy. In this order, Dr. O'Donoghue signed a waiver of rights which stated, "I waive my right to demand an evidentiary hearing or to *raise additional constitutional or statutory objections in this matter*" (emphasis added). Contrary to Dr. O'Donoghue's contention, his motion for declaratory judgment is not a separate action from the administrative appeal. Therefore, the court was correct in rendering this issue moot given the explicit waiver of his right to raise constitutional issues arising from this matter in the agreed order.

Dr. O'Donoghue further argues that he is somehow entitled to compensatory damages in this matter and that the trial court erred in not addressing this claim. First, it is unclear when this claim was initially raised. Moreover, Dr. O'Donoghue agreed in the order to pay the costs the Board had incurred during the

litigation. Therefore, it is not only counterintuitive to think Dr. O'Donoghue would be entitled to compensatory damages, but it is also a decided, and therefore moot, issue in light of the explicit language in the agreed order.

For the reasons stated within, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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